

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs April 25, 2006

STATE OF TENNESSEE v. TERRY R. KLEINBERG

Appeal from the Circuit Court for Humphreys County
No. 10565 George C. Sexton, Judge

No. M2005-01717-CCA-R3-CD - Filed May 19, 2006

The appellant, Terry Kleinberg, was indicted for felony reckless endangerment in October of 2003. After a bench trial, the appellant was convicted of the offense and sentenced to a one-year suspended sentence. On appeal, the appellant challenges the sufficiency of the evidence, and the trial court's denial of judicial diversion. Because the evidence is sufficient to support the conviction and the trial court did not abuse its discretion in denying judicial diversion, we affirm the judgment of the trial court.

Tenn. R. App. P. 3; Judgment of the Circuit Court is Affirmed

JERRY L. SMITH, J., delivered the opinion of the court, in which THOMAS T. WOODALL and JAMES CURWOOD WITT, JR., JJ., joined.

Michael W. Patrick. Waverly, Tennessee, for the appellant, Terry K. Kleinberg.

Paul G. Summers, Attorney General and Reporter; Blind Akrawi, Assistant Attorney General; Dan Alsobrooks, District Attorney General; and Lisa C. Donegan, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

Factual Background

On October 6, 2003, the appellant was indicted for felony reckless endangerment for events occurring on July 5, 2003. The appellant waived his right to a jury trial. At the trial in February of 2005, the victim, Christopher Howard, testified that on July 5, 2003 he was driving eastbound on Interstate 40. As he traveled through Humphreys County, Mr. Howard saw a tractor-trailer in his rearview mirror, driven by the appellant, following very close to his bumper. At the time, Howard was traveling at seventy miles per hour in the left lane. According to Mr. Howard, there was quite a bit of traffic on the interstate at the time. In order to get away from the tractor-trailer, Mr. Howard

attempted to cross into the right lane. However, the tractor-trailer was so close to Mr. Howard's car that he could not see the traffic in the right lane. The victim was unable to speed up because there was a vehicle in front of him.

The tractor-trailer then got into the right lane and started moving over into Mr. Howard's lane. In order to avoid coming into contact with the tractor-trailer, Mr. Howard was forced to drive off of the side of the road. When the tractor-trailer moved back into the right lane, Mr. Howard got back onto the road in the left lane.

According to Mr. Howard, the tractor-trailer again swerved into his lane. The second time, the tractor-trailer's tires hit Mr. Howard's car and sent it into the median in the center of the interstate. According to Mr. Howard, his car sustained damage, but was still operational. Mr. Howard was able to drive his car back onto the road where he was signaled to pull over at the next exit by two drivers who witnessed the incident. The cars all exited the interstate and waited for law enforcement personnel to arrive at the scene.

Cheryl Navarra, a school teacher from Mississippi, was one of the witnesses to the incident. She was traveling with her three daughters and a family friend to Kentucky when she saw the tractor-trailer swerve over into the left lane, barely missing Mr. Howard's car. At the time, she simply thought the driver of the tractor-trailer had not seen the car. Then, a few minutes later, Ms. Navarra saw the tractor-trailer push the car off the road. According to Ms. Navarra, Mr. Howard's car was trapped in between the middle part of the trailer, hanging half off the road and half on the pavement. As the tractor-trailer and the victim's car approached a bridge, the tractor-trailer moved back over into the right lane and Mr. Howard was able to get his car back on the road.

Ms. Navarra was able to get the license plate number of the tractor-trailer and had the family friend riding in her passenger seat call the police. The 911 operator informed the family friend that the appellant had been directed to stop at the next exit. According to Ms. Navarra, instead of stopping at the exit, the appellant slammed on his brakes and came to an abrupt stop in front of a bridge.

Ms. Navarra was also able to motion to Mr. Howard in order to get him to pull his car over at the next exit. Once off the interstate, Ms. Navarra and her companions waited with Mr. Howard until the police arrived. Another witness to the incident followed the appellant until the police stopped him further on down the interstate.

At trial, the appellant took the stand in his own defense. He testified that while traveling eastbound on Interstate 40, he received a CB report about a blue or purple car that was "running erratic," slamming on its brakes and trapping trucks. As he was driving up a hill, he noticed a driver in a purple car giving "the finger" to truck drivers and slamming on his brakes. The appellant identified Mr. Howard as the driver of the car.

The appellant opined that Mr. Howard was attempting to cause an accident. In fact, he thought that the victim was trying to commit a form of insurance fraud known as “squat and stoop.” The appellant described a “squat and stoop” situation as where two vehicles act in concert with each other and the lead car slams on its brakes in front of a truck while the second car is either beside or behind the truck, forcing the truck to get into an accident.

The appellant claimed that he saw another vehicle “working” with Mr. Howard that day on the interstate. In fact, the appellant claimed that while Mr. Howard was driving in front of him slamming on his brakes, the second car was at his left rear bumper. Further, the appellant claimed that he saw Mr. Howard drive off at a high rate of speed when he noticed the appellant talking to the police on his cell phone.

At the conclusion of the bench trial, the trial court made the following findings of fact and conclusions of law:

Well, I don’t know what else happened out there that day. I get the impression that [the appellant is] telling the truth at least in portions of his stories, but the Court can’t get over the fact of the credibility of Ms. Navarra. She’s passing through here on her way from Mississippi to Louisville, Kentucky, she sees this incident, she’s got her three daughters and one of her daughter’s boyfriends with her and it concerns her to the point to stop with [the victim] here on the side of the road and wait for an hour for a police officer to come and take her statement and she called - - or had her daughter’s boyfriend call when they’re viewing the incident. She takes the time and trouble to come back up here from Mississippi to testify in this case.

The court just can’t overcome the credibility of that witness. And whether [the appellant is] telling the truth or not, as I said, I kind of believe he is as to what he saw out there. At least at that point in time, that Ms. Navarra described when [the appellant] pulled his truck over and ran this gentleman off the road, at that point in time he was reckless with an 18-wheeler which is a deadly weapon as used in this case and the Court finds him guilty.

Subsequently, at a sentencing hearing, the trial court sentenced the appellant to a one-year suspended sentence. The trial court denied judicial diversion due to a “prior . . . problem” with paying child support.

The appellant filed a timely notice of appeal challenging the sufficiency of the evidence and the trial court’s denial of judicial diversion.

Analysis
Sufficiency of the Evidence

The appellant challenges the sufficiency of the evidence to support his conviction for reckless endangerment. Specifically, the appellant argues that because the trial court found him to be a credible witness, there was no “evidence of proof beyond a reasonable doubt presented . . . to convict the appellant.” The State contends that the evidence was more than sufficient to support the conviction.

When a defendant challenges the sufficiency of the evidence, this Court is obliged to review that claim according to certain well-settled principles. A verdict of guilty, rendered by a jury and “approved by the trial judge, accredits the testimony of the” State’s witnesses and resolves all conflicts in the testimony in favor of the state. State v. Cazes, 875 S.W.2d 253, 259 (Tenn. 1994); State v. Harris, 839 S.W.2d 54, 75 (Tenn. 1992). Thus, although the accused is originally cloaked with a presumption of innocence, the jury verdict of guilty removes this presumption “and replaces it with one of guilt.” State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). Hence, on appeal, the burden of proof rests with the defendant to demonstrate the insufficiency of the convicting evidence. Id. The relevant question the reviewing court must answer is whether any rational trier of fact could have found the accused guilty of every element of the offense beyond a reasonable doubt. See Tenn. R. App. P. 13(e); Harris, 839 S.W.2d at 75. In making this decision, we are to accord the State “the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences that may be drawn therefrom.” See Tuggle, 639 S.W.2d at 914. As such, this Court is precluded from reweighing or reconsidering the evidence when evaluating the convicting proof. State v. Morgan, 929 S.W.2d 380, 383 (Tenn. Crim. App. 1996); State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Moreover, we may not substitute our own “inferences for those drawn by the trier of fact from circumstantial evidence.” Matthews, 805 S.W.2d at 779. Further, it is well-settled that all questions involving the credibility of witnesses, the weight and value to be given the evidence, and all factual issues are resolved by the trier of fact, not an appellate court. See State v. Morris, 24 S.W.3d 788, 795 (Tenn. 2000).

In order to convict the appellant of felony reckless endangerment, the State was required to prove that the appellant “recklessly engage[d] in conduct which places or may place another person in imminent danger of death or serious bodily injury.” Tenn. Code Ann. § 39-13-103(a). When the conduct is conducted with a “deadly weapon,” the crime is a class E felony. Tenn. Code Ann. § 39-13-103(b). The term “reckless:”

[R]efers to a person who acts recklessly with respect to circumstances surrounding the conduct or the result of the conduct when the person is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would

exercise under all the circumstances as viewed from the accused person's standpoint.

Tenn. Code Ann. § 39-11-302(c).

Viewing the evidence in the light most favorable to the State, the evidence establishes that the appellant recklessly ran Mr. Howard off the heavily-traveled interstate two times with his tractor-trailer. The fact that Mr. Howard sustained no serious injury is irrelevant to the offense. State v. Baggett, 836 S.W.2d 593, 595 (Tenn. Crim. App. 1992). The appellant's reckless conduct was witnessed by Ms. Navarra who corroborated Mr. Howard's allegations. The trial court accredited the testimony of Howard and Ms. Navarra and found the evidence sufficient to support a conviction for reckless endangerment. While the appellant gave testimony which conflicted with that of the victim, we are reminded that questions involving the credibility of witnesses, the weight and value to be given the evidence, and all factual issues are resolved by the trier of fact, not an appellate court. See Morris, 24 S.W.3d at 795. Moreover, the trier of fact is empowered to accredit part of a witness' testimony and disbelieve other parts. The evidence is sufficient to support the conviction.¹ Thus, we affirm the judgment of the trial court. This issue is without merit.

Denial of Judicial Diversion

Lastly, the appellant argues that the trial court abused its discretion by denying judicial diversion. The State argues that the appellant waived the issue for failure to cite any authority or make citations to the record to support his argument in accordance with Rule 10(b) of the Rules of the Tennessee Court of Criminal Appeals.

While we acknowledge that the appellant waived this issue by failing to cite authority or make appropriate references to the record as required by Rule 10(b), we will address the appellant's issue despite the waiver. According to Tennessee Code Annotated section 40-35-313, commonly referred to as "judicial diversion," the trial court may, at its discretion, following a determination of guilt, defer further proceedings and place a qualified defendant on probation without entering a judgment of guilt. Tenn. Code Ann. § 40-35-313(a)(1)(A). A qualified defendant is one who:

- (a) Is found guilty of or pleads guilty or nolo contendere to the offense for which deferral of further proceedings is sought;
- (b) Is not seeking deferral of further proceedings for a sexual offense or a Class A or Class B felony; and
- (c) Has not previously been convicted of a felony or a Class A misdemeanor.

Tenn. Code Ann. § 40-35-313(a)(1)(B)(i)(a), (b), & (c). When a defendant contends that the trial court committed error in refusing to grant judicial diversion, we must determine whether the trial

¹The appellant does not claim that his actions were motivated by necessity or a sense of the need to disable Howard's car to prevent a danger to the appellant or others. Under these circumstances, the appellant's actions, as recounted by Mr. Howard and Ms. Navarra, cannot be viewed as justified.

court abused its discretion by denying the defendant's request for judicial diversion. State v. Cutshaw, 967 S.W.2d 332, 344 (Tenn. Crim. App. 1997). Judicial diversion is similar to pretrial diversion. However, judicial diversion follows a determination of guilt, and the decision to grant judicial diversion is initiated with the trial court, not the prosecutor. State v. Anderson, 857 S.W.2d 571, 572 (Tenn. Crim. App. 1992). When a defendant challenges the trial court's denial of judicial diversion, we may not revisit the issue if the record contains any substantial evidence supporting the trial court's decision. Cutshaw, 967 S.W.2d at 344; State v. Parker, 932 S.W.2d 945, 958 (Tenn. Crim. App. 1996).

The criteria that the trial court must consider in determining whether a qualified defendant should be granted judicial diversion include the following: (1) the defendant's amenability to correction; (2) the circumstances of the offense; (3) the defendant's criminal record; (4) the defendant's social history; (5) the defendant's physical and mental health; and (6) the deterrence value to the defendant and others. Cutshaw, 967 S.W.2d at 343-44; Parker, 932 S.W.2d at 958. An additional consideration is whether judicial diversion will serve the ends of justice, i.e., the interests of the public as well as the defendant. Cutshaw, 967 S.W.2d at 344; Parker, 932 S.W.2d at 958; State v. Bonestel, 871 S.W.2d 163, 168 (Tenn. Crim. App. 1993), overruled on other grounds by State v. Hooper, 29 S.W.3d 1, 9 (Tenn. 2000).

At the sentencing hearing, the State introduced proof that the appellant had an arrest in 1995 for contempt in not paying child support for which he served 180 days and was placed on probation for three years. Further, the appellant has a prior criminal history in California which includes convictions for carrying a concealed weapon, battery, and two charges for possession of controlled narcotic substances. The trial court stated the following in denying judicial diversion:

This was an unusual case. The fact that we had a witness who was passing through here on the interstate from Mississippi, I guess it was. It was somewhere south of here that witnessed this, gave a very detailed, vivid account of what happened, came back - - made a trip back to Tennessee to testify in this trial it concerned her so much.

I don't think with this prior child support problem he had - - I think that disqualifies him from 40-35-313.

After a review of the record, we determine that the trial court did not abuse its discretion in denying judicial diversion. There was "substantial evidence" in the form of the appellant's criminal and social history in the record to support the trial court's decision. Cutshaw, 967 S.W.2d at 344; Parker, 932 S.W.2d at 958. This issue is without merit.

Conclusion

For the foregoing reasons, the judgment of the trial court is affirmed.

JERRY L. SMITH, JUDGE